IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 558.

FEDERAL POWER COMMISSION,

Petitioner,

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR PANHANDLE EASTERN PIPE LINE COMPANY.

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Opinions Below.

The findings of fact and conclusions of law of the District Court appear in the Record (R. 60-66). The opinion of the Court of Appeals for the Third Circuit, written by Judge Goodrich (R. 74-81), is reported at 172 F. 2d 57.

Statute Involved.

The pertinent statute is the Natural Gas Act of 1938 (Act of June 21, 1938, c. 556, 52 Stat. 821), as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U. S. C. 717 f. f.

Statement.

The Panhandle company is engaged in transporting and selling natural gas in interstate commerce. It operates a pipe line system extending from Texas to Michigan. It is also engaged in producing natural gas, with gas leases and contracts for purchase of gas in Texas, Oklahoma and Kansas.

The Natural Gas Act of 1938 grants regulatory authority to the Federal Power Commission (1) over transportation of natural gas in interstate commerce and (2) over sale of natural gas in interstate commerce for resale to the public. At the same time the Act, by section 1(b), declares that its provisions

> "shall not apply * * * to the production or gathering of natural gas".

Transfer of gas leases to Hugoton Production Company and declaration of dividend. On October 11, 1948, Panhandle transferred to Hugoton Production Company (a Delaware corporation which Panhandle caused to be organized in September, 1948) gas leases on 97,000 acres located in Grant and Stevens Counties, Kansas, along with the sum of $675,000 in cash, as consideration for the purchase of 810,000 shares of Hugoton's common stock. Panhandle retained the option to purchase the gas produced from such acreage after January 1, 1965. The acreage is undeveloped and is not connected with any pipe line system (R.4-5; 24-25; 61).

As part of the same transaction, Panhandle declared a dividend to the holders of its common stock, payable in common stock of Hugoton at the rate of one-half share for each share of common stock of Panhandle, the dividend

comprising the entire 810,000 shares of Hugoton stock acquired by Panhandle. The dividend was payable November 17, 1948, to stockholders of record October 29, 1948 (R.5; 25; 29-32; 62-63).

The gas reserves under the leases are estimated to be 700 billion cubic feet. It was contemplated that Hugoton would develop the acreage and sell a part of the gas before January 1, 1965,—and under date of October 18, 1948, Hugoton entered into a contract with Kansas Power and Light Company providing for the sale to Kansas Power and Light for the period of 15 years (November 1, 1949 to November 1, 1964) of gas to be produced from such leases. The contract provided that the gas sold is to be produced from wells located in Kansas, and Kansas Power and Light agreed that the gas is to be consumed by it or sold by it for consumption within Kansas. The total volume of gas to be sold by Hugoton to Kansas Power and Light is estimated at 300 billion cubic feet, so that Panhandle will retain a call after January 1, 1965 on the remaining 400 billion cubic feet (R. 27; 61-62).

Panhandle still owns or controls, after transfer of such leases to Hugoton, over 6 trillion cubic feet of gas, or more than enough gas reserves to serve its entire system for more than twenty-five years. This takes no account of additional gas reserves constantly being acquired (R. 27-28).

The transfer of gas leases to Hugoton made no substantial impairment in the ability of Panhandle to transport and sell natural gas in interstate commerce. It has plenty of gas in the ground, more gas in the ground than pipe line capacity to transport such gas. The Commission conceded this in the District Court:

> "Mr. Tarver: Panhandle has no shortage of gas in the ground, and there is no contention that it has,

but it does have a shortage of pipe line facilities" (R. 46).

The gas production leases disposed of came to less than 5 percent of the total gas under control of Panhandle, as of the date of the transfer (R. 27), without taking into account the constant additions to gas reserves.

It has been the practice in the natural gas industry to trade freely in gas leases, without seeking approval of the Federal Power Commission. The Commission in the past has never asserted the right to regulate such transactions (R. 28; 62).

The transaction received publicity in the press. Panhandle informed the Commission of it informally on October 12, 1948 (R. 28).

On October 29, 1948, Panhandle delivered to United States Corporation Company, transfer agent of Hugoton stock, a certificate representing 810,000 shares of common stock of Hugoton registered in the name of Panhandle and endorsed in blank. Pursuant to the directions of Panhandle, United States Corporation Company caused such shares of stock to be transferred to the names of the stockholders of record of Panhandle on October 29, 1948, caused Federal transfer stamps to be affixed and cancelled, and made out new certificates in the names of such persons and inserted the same in envelopes ready to mail, intending to mail such certificates on November 15 and November 16, 1948. These preparations were halted on November 13, when a restraining order was issued (R. 25-26; 32-34; 63).

Orders of Federal Power Commission. On October 26, 1948, the Commission issued an order instituting an investigation (stated to be in pursuance of Section 14 of the Natural Gas Act) as to the transfer of the gas leases. That order was not an assertion of regulatory power by the

Commission, since by the terms of Section 14 of the Act the Commission's investigatory powers go beyond its regulatory powers.

On November 10, 1948, however, the Commission entered a supplementary order directing Panhandle and Hugoton to show cause why the Commission should not direct them to cancel the transfer of the gas leases from Panhandle to Hugoton and the issuance of the capital stock of Hugoton to Panhandle, and why the Commission should not direct Panhandle to refrain from transferring the capital stock of Hugoton by way of dividend or otherwise. The Commission's order also purported to direct maintenance of the *status quo* pending such determination (R. 5-7; 11-18; 63).

The Proceedings in the District Court. On November 13, 1948, the Commission brought this suit in the United States District Court for the District of Delaware, requesting an injunction to enforce its direction to maintain the *status quo* pending hearing and determination by the Commission of the questions presented by its order of November 10, 1948. At the same time the Commission moved for preliminary injunction to prevent delivery of the Hugoton stock certificates.

The complaint filed by the Commission alleged that the action arises under Sections 20(a) and 22 of the Natural Gas Act. (The Commission amended its complaint at the hearing before the District Court to state that the action also arises under the general equity powers of the court.)

The complaint set forth the transfer of the gas leases from Panhandle to Hugoton, the issuance of the stock of Hugoton, the declaration of such stock as a dividend to the stockholders of Panhandle, and the issuance by the

Commission of its orders of October 26, 1948 and November 10, 1948.

The complaint alleged (when read with Paragraphs (c) to (l) inclusive, and (r) to (s) inclusive of the Commission's order of November 10, 1948 which are incorporated by reference in the complaint) that in rate proceedings back in 1942 certain of the gas leases transferred by Panhandle had been included in Panhandle's rate base, and that delay rentals, renewal payments and other exploration and development costs relating to such leases had since been included in Panhandle's operating revenue deductions. Also that in 1946 and 1947 Panhandle had applied to the Commission under Section 7 of the Natural Gas Act for certificates of convenience and necessity with respect to a proposed enlargement of its interstate pipe line system by construction of Group "A", Group "B" and Group "C" facilities; and that in presenting to the Commission evidence of adequate gas reserves Panhandle had included as a part of its total gas reserves the acreage subsequently transferred to Hugoton. The complaint asserted that by reason of the foregoing facts, Panhandle *may* have pledged or dedicated its reserves and that "it *may* be that defendant could not lawfully transfer to Hugoton the natural-gas leases, without prior authorization by the Commission based on a finding that the public convenience and necessity permitted such transfer" (emphasis supplied).

The District Court, after hearing, denied preliminary injunction. The Commission appealed to the Court of Appeals for the Third Circuit. That Court affirmed the order of the District Court denying preliminary injunction. Successive restraining orders, however, have prevented distribution of the Hugoton stock certificates.

Intervention of Kansas State Corporation Commission.

In the Court of Appeals the Kansas State Corporation Commission was allowed to intervene in order to protect its interests (R. 74).

The petition of the Kansas State Corporation Commission showed that it is charged with jurisdiction over production of natural gas in Kansas, as well as with regulation of public utilities; that it issues orders regulating production of natural gas in the Hugoton Field; that the transaction sought to be set aside will make efficient gas service available to consumers in Kansas.

The petition also showed that free trading in leases is in the public interest and has been encouraged by the State Corporation Commission, and that it is a practice over which the State Corporation Commission has and exercises jurisdiction (R. 70-73).

Ground of Decisions Below.

The ground of decision taken by the District Court and by the Court of Appeals was that the transaction attacked by the Federal Power Commission had to do with production of natural gas; that the Natural Gas Act by explicit provision excluded "production or gathering of natural gas" from the Commission's jurisdiction; and that the incidents counted on by the Commission as bringing the case within the reach of its authority did not carry significance.

Both courts also pointed out that it has been the practice in the industry to deal freely in gas leases, and that the Commission has never heretofore asserted the right to regulate transfers of such leases. The Court of Appeals also referred to the Commission's regulations, it being

stated in the regulations that the Natural Gas Act did not give the Commission regulatory power over production of natural gas.

Summary of Argument.

Our argument is divided into two principal points.

Point I is that the Natural Gas Act does not authorize the Federal Power Commission to regulate transfers of gas leases. This conclusion is supported by five propositions:

A. Authority over transfers of gas leases has been specifically withheld from the Commission by Section 1(b) of the Act.

In support of this we cite Section 1(b) of the Act which provides that "the provisions of this Act * * * shall not apply * * * to the production or gathering of natural gas"; and we also cite the decisions of this Court which consider the import of that clause in the light of the Act as a whole.

B. Since the language of the Act is unambiguous legislative history is of little benefit. But actually the legislative history of the Act bears out the fact that Congress deliberately denied to the Commission regulatory power over production activities. The legislative history further bears out the fact that no distinction may properly be drawn between "production or gathering" and "production or gathering facilities".

C. The exclusion of regulation of production and gathering of natural gas was for the set purpose of preserving authority in that field to the states.

The assumption by the Federal Power Commission of authority over transfers of gas leases would encroach upon the regulatory powers of the states and would defeat the express intent of the Natural Gas Act. This is borne out by the position taken by the Kansas State Corporation Commission in this case.

D. The rules and practices of the Federal Power Commission itself are powerful proof that it possesses no authority over activities in gas leases. Although the Commission has had a set of rules for eleven years, the rules have never suggested that dealings in gas leases should be submitted to the Commission for approval. On the contrary, the Commission has acknowledged in its own "General Rules and Regulations" that the Natural Gas Act gives it no jurisdiction over production activities. Until this case came up, the Commission never asserted the right to regulate transfers of such leases, which have been freely disposed of in the natural gas industry.

E. Jurisdiction of the Federal Power Commission over transfers of gas leases, denied by the plain language of Section 1(b) of the Act, may not be built up from other sections of the Act, as urged by the Commission.

Sections 5(b), 6(a) and (b), 8(a), 9(a), 10(a) and 14(b), cited by the Commission, have nothing to do with the activity of producing or gathering natural gas. These sections deal with investigations, accounting methods and reports. This Court has held that such sections were designed to aid the Commission in its rate-making functions.

Also, Sections 4 and 5, granting control over rates, and Section 7, granting control over transportation facilities, have nothing to do with the activity of producing gas.

The Commission's argument that Panhandle may have irrevocably "dedicated" gas reserves to the service of its transportation facilities is unsound. Not only does it present practical difficulties which cannot be answered, but also, if countenanced, it would permit the Federal Power Commission to move in on a broad front and assert regulatory power over all production facilities of virtually all natural gas companies—to the utter disruption of regulation by the states over such production.

There is no need for concern about the possibility that in the absence of Commission control over transfers of gas leases a natural-gas company might dispose of so many of its reserves that it would give up its "life blood" and could no longer serve its pipe line. A practical safeguard against this contingency lies in the fact that an interstate pipe line company represents a huge investment — over $100,000,000 in Panhandle's case — and Congress surely appreciated that no company would deliberately jeopardize such an investment by dissipating its gas reserves. As recently as March 30, 1949, the Commission itself, in passing upon a certificate application by another company, recognized the significance of management judgment in maintaining adequate gas reserves.

Point II of our argument is that the complaint did not show any basis for the issuance of an injunction, and that the Courts below were right in so holding.

Under this point, we demonstrate in Subdivision A that no basis for relief was shown under Section 20(a) of the Natural Gas Act, which delineates the instances in which the Commission may apply to a District Court for an injunction. We show that the Commission did not bring its case within this section.

Under Subdivision B of Point II, we show that the Commission made no case for an injunction by invoking the general equitable powers of the District Court. In the first place the doctrine that the Courts will aid an administrative body in protecting its jurisdiction has no application in a case where, as here, the organic statute by specific provision (Section 20) defines the situations in which the administrative agency has the right to go to the courts for injunctive relief. Furthermore, under this doctrine probable jurisdiction in the administrative agency must be made to appear, and in the present case probable jurisdiction in the Federal Power Commission was lacking.

Argument.

I.

The Natural Gas Act does not authorize the Commission to regulate transfers of gas leases. This is manifest on the face of the act and in the Commission's own rules.

The matters at issue are governed by the Natural Gas Act of 1938.

The intent of Congress in passing that act was to cover under Federal regulation the transportation of natural gas in interstate commerce and the sale in interstate commerce of such gas for resale to the public, such Federal regulation to be administered by the Federal Power Commission.

It was at the same time the intent of Congress, expressed in unmistakable terms, to leave to State regulation the following activities: any other transportation and sale, local distribution of natural gas, and production and gathering of natural gas.

It is crystal clear that Congress did not intend to grant to the Federal Power Commission any degree of authority over gas acreage. Gas acreage is a phase of production, actual in some cases, potential in others. Regulation over gas acreage was left with the States; and assumption by the Commission of authority in that field would defeat the deliberate intention of Congress in enacting the Natural Gas Act.

While the Commission argues in this case that it does have control over some phases of production of natural gas, the Commission's own rules and regulations, as we shall show later, acknowledge its lack of authority over matters concerned with production.

A. Authority over transfer of gas leases has been specifically withheld from the Commission by Section 1 (b) of the Natural Gas Act.

Section 1 (b) of the Natural Gas Act provides:

> "The provisions of this act * * * shall not apply * * * to the production or gathering of natural gas."(1)

There is no need to labor the meaning of those plain words. The plan of regulation designed by Congress did not embrace control of production of natural gas by the Commission.

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(1) The full text of Section 1 (b) is as follows:

"(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591, 612 (1944);
Colorado Interstate Gas Co. v. *Federal Power Commission*, 324 U. S. 581, 602 (1944);
Interstate Natural Gas Co. v. *Federal Power Commission*, 331 U. S. 682, 690 (1947);
Panhandle Eastern Pipe Line Co. v. *Public Service Commission of Indiana*, 332 U. S. 507, 516 (1947).

In the *Hope Natural Gas* case, *supra*, this Court stated:

> "As we have said, the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over the 'production or gathering of natural gas'. § 1(b)" (pages 612-613).

In the *Colorado Interstate* case, *supra*, it was decided that in rate making the Commission might include production properties in the rate base of a natural gas company, this by reason of certain sections of the Act relative to rate making. Mr. Justice Douglas, who wrote for the majority, went on to point out:

> "That does not mean that the part of § 1(b) which provides that the Act shall not apply 'to the production or gathering of natural gas' is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas" (pages 602-603).

B. The deliberate denial to the Commission of regulatory power over transfers of gas leases is borne out by the legislative history of the Act.

The Commission devotes a substantial portion of its brief to a discussion of the legislative history of the Natural Gas Act and its predecessor bills.

In a case such as this, where the language of the statute is unambiguous in meaning, legislative history is of little benefit.

This Court said in *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U. S. 485, 492:

> "We are invited to make a lengthy examination of views expressed in Congress while this and later legislation was pending to show that exclusion of foremen was intended. There is, however, no ambiguity in this Act to be clarified by resort to legislative history, either of the Act itself or of subsequent legislative proposals which failed to become law."

Nevertheless the fact is that the legislative history of the Natural Gas Act bears out the fact that Congress deliberately intended to deny to the Federal Power Commission any regulatory authority over transfers of gas leases.

The following is the interpretation put by Dozier A. DeVane, Solicitor for the Federal Power Commission, upon an earlier bill substantially similar to the Natural Gas Act (from Report of Hearings before Subcommittee of Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, Second Session, on H. R. 11662):

> "Mr. Cole [Congressman]. Does this bill give anywhere the Commission power over the source of natural gas in the different fields in a manner which we might call comparable to that which your Commission now has over hydro-electric generating plants?
>
> "Mr. DeVane. It does not; no, it does not attempt to regulate the gathering rates or the gathering business. Section 11, I believe it is of the bill deals with that" (p. 34).

A brief in support of constitutionality of the Act submitted by Dozier A. DeVane, and Thomas J. Tingley, Assistant Solicitor of the Federal Power Commission, appearing in said Report at page 17, stated:

> "The bill makes no attempt to regulate the production or gathering facilities of a natural gas company, this function being purely local in character, * * *"

This should dispose of the argument made in the Commission's brief that there should be a distinction between "production or gathering" and "production or gathering facilities."

C. The assumption by the Commission of authority over transfers of gas leases would encroach upon the regulatory powers of the States and would defeat the deliberate purpose of the Natural Gas Act.

The decisions of this Court leave no doubt that exception from the Commission's jurisdiction of regulation of the production and gathering of natural gas was for the deliberate purpose of preserving authority in that field to the States.

This Court, in *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, said, at page 690:

> "Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters."

The Commission in its brief does not dispute this principle. Nor does it dispute the fact that Kansas and other

states have adopted statutes relating to the proration and conservation of natural gas for the purpose of preventing uneconomical development and waste of this natural resource.[2]

However, the Commission finds fault with the finding by the Court of Appeals (R. 76) that the states are exercising their regulatory powers in the field of transfers of gas leases. The Commission claims that despite this finding the fact is that the states do not attempt to regulate the transfer or disposition of gas leases or reserves.

The Commission has missed the significance of the position of the Kansas State Corporation Commission in this suit. The position of the Kansas Commission is that free traffic in leases and production rights in the Hugoton Field "is essential to the discharge of the statutory duty imposed upon it to secure the orderly development of the natural resources within the State of Kansas" (R. 73).

The manner in which this factor is related to proration and conservation is clearly explained in the petition for intervention of the Kansas State Corporation Commission as follows (R. 72):

> "* * * Free trading of leases and production rights among the various purchasers to enable them economically to connect producing wells to pipeline facilities has resulted in the prompt production and utilization of gas as the wells are completed. This tends to eliminate unproduced prorated allowable production, facilitates regulation of gas taking to

[2] Kansas: Chap. 55, Sees. 701-713 (Gen. Stat. 1947 Supp.);
Michigan: Title 13, Chap. 97, Secs. 13.138(1)-13.140(10) (Stat. Ann. 1947 Supp.);
Oklahoma: Title 52, Chap. 3, Secs. 81-247 (Stat. of 1941 as amended);
Texas: Title 102, Art. 6008 *et seq.* (Vernon 1925, with 1948 Supp.).

meet the market demands and helps to protect the owner of newly developed acreage against drainage by other outlets in the vicinity of his well. Above all, it has enabled purchasers to 'block', or consolidate, their respective production acreage to or around their pipeline transportation. This latter practice has been encouraged by the Corporation Commission because it helps to prevent undeveloped islands of productive acreage and is an important factor in securing orderly development of the Kansas Hugoton Field."

By reason of the foregoing, the Kansas State Corporation Commission asserts in its petition that "the practice of exchanging leases among purchasers within the State of Kansas is an activity related to production and gathering of natural gas over which the Corporation Commission has and exercises jurisdiction" (R. 73). Since the Kansas State Corporation Commission believes that the most effective way of exercising this jurisdiction is to permit free traffic in leases and production rights, any effort on the part of the Federal Power Commission to restrict such traffic would necessarily conflict with the power of the State and run counter to the basic purpose of the exception from Federal jurisdiction of production and gathering in accordance with Section 1(b) of the Natural Gas Act.

D. The rules and practices of the Commission are powerful proof that it possesses no authority over activities in gas leases.

(1) The rules and regulations of the Commission.

It is of significance that although the Commission has had a set of rules for eleven years, the rules have never suggested that dealings in gas leases by a natural gas

company should be submitted to the Commission for approval.

On the contrary, the "General Rules and Regulations" of the Commission as they stand today provide:

> "The Federal Power Commission is of the opinion that it was the intent of the Congress that the control of production or gathering of natural gas should remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects" (18 C. F. R., Chap. I, Sec. 03.79).

This sentence from the Commission's own rules is a plain acknowledgment that the Natural Gas Act gives it no control over production of natural gas and no standing to bring the present suit.

The Commission, in its annual report for 1946, made the same confession of lack of authority:

> "A major problem that has come before the Commission in rate proceedings arises from the fact that the provisions of the Natural Gas Act are specifically made inapplicable to 'the production or gathering of natural gas.' In several instances where pipe line companies were also engaged in the production and gathering of gas, the Commission in its rate cases interpreted this exclusion to refer to the activities of producing and gathering, but permitting the Commission to consider the costs related to producing and gathering facilities in fixing interstate rates for resale" (pages 52-53).

(2) The practice of the Commission.

It is also significant that the present endeavor to assert jurisdiction over dealings in gas leases is unique in the history of the Commission, although the Natural Gas Act has been on the books for eleven years.

During the eleven year period it has been the practice in the natural gas industry (well known to the Commission and found as a fact by the District Court) to deal freely in gas leases. It is a common incident to exchange gas leases, to dispose of them to other concerns in the industry, to drop them altogether.

Until this case came up the Commission never asserted the right to regulate transfers of such leases. This also was found as a fact by the District Court.

In similar situations involving an attempted exercise of power on the part of this Commission or other administrative bodies, the Courts have given great weight to the failure previously to exercise or assert that power.

Federal Trade Commission v. *Bunte Bros.*, 312 U. S. 349, 351 (1941);

Border Pipe Line Company v. *Federal Power Commission*, 171 F. 2d 149 (C. A. D. C.) (1948).

E. Jurisdiction of the Commission over transfers of gas leases, denied by the plain language of Section 1(b) of the Act, may not be built up from other sections of the Act.

Despite the specific exclusion of authority to regulate production and gathering found in Section 1(b) of the Act, the Commission points to other provisions of the Act, and from these suggests that this exclusion "was not intended to extend to all phases of production or gathering" and "was not intended to deny to the Commission jurisdiction over all transfers of gas reserves".

The Commission's argument, in effect, is that Congress did not mean what it said in Section 1(b).

(1) Provisions of the Act as to investigations, accounting practices and reports.

The Commission cites various sections of the Act which it contends vest "jurisdiction in the Commission in regard to both production and gathering properties and gas reserves." It refers to Sections 5(b), 6(a) and (b), 8(a), 9(a), 10(a) and 14(b).

The fact is that these sections have nothing to do with the activity of producing or gathering natural gas. Sections 5(b), 6(a) and 14(b) deal with investigations. Sections 8(a) and 9(a) deal with accounting methods. Sections 6(b) and 10(a) relate to reports to be filed.

This Court in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581, considered the import of these provisions and concluded that they were designed to aid the Commission in its rate-making functions. The Court said, at page 602:

> "These provisions all suggest that when Congress designed this Act, it was thinking in terms of the ingredients of a rate base, the deductions which might be made, and the additions which were contemplated."

While holding that Section 1(b) "must be reconciled with the explicit provisions which describe the normal conventions of rate-making" the Court nevertheless went on to say: "Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas."

The Commission finds itself in a dilemma when it urges that references to production properties in these provisions may lead to the conclusion that regulation of transfers of gas leases should be read into the Act. Certainly the Con-

gress which so meticulously designed the Act so as to aid the Commission in its rate-making functions, would not, had it intended to impose any form of control over transfers of gas leases, have been so lax as to have omitted any form of machinery under which the Commission could operate to put that control into effect.

The answer is again that Congress acted with set purpose when it excluded the Commission from jurisdiction over production and gathering of natural gas, and with similar design omitted from the Act any form of procedure by which the Commission might require natural gas companies to apply for permission to transfer gas leases.

(2) Provisions as to rates and service; the dedication theory.

In an effort to climb over the barrier erected by Section 1(b) of the Natural Gas Act, the Commission alleged in its complaint that certain of the gas leases involved in the transfer to Hugoton had been included by Panhandle in its rate base, and also that Panhandle in applying for certificates of public convenience and necessity for construction of additional pipeline facilities had mentioned some of the gas leases as being part of its gas reserves, and so might have "dedicated" such gas production leases to the service of its transportation facilities. Reliance is placed on Sections 4 and 5, granting control over rates, and on Section 7, granting control over transportation facilities.

The amounts involved are trivial, and it is undisputed that the acreage is undeveloped and unconnected with any pipeline. Moreover, the price at which the gas will be sold by Hugoton is satisfactory to the Kansas State Corporation Commission, and, in the opinion of that body "promotes the

welfare of the natural gas industry in Kansas and the welfare of the people of Kansas'' (R. 71).

Nevertheless, the contention is made that transfer of these gas leases might result in unjust and unreasonable rates to consumers, and might also have a bearing on the usefulness or service life of the transportation facilities, so that no transfer of acreage may be made without the Commission's prior approval.

The argument comes to this, that any item of gas reserves owned at the time of the establishment of a rate base or of the issuance of a certificate for construction or enlargement of a pipeline, becomes frozen, not to be thawed out except by the Commission.

As the Court of Appeals pointed out, this argument proves too much. If it were sound, the Commission could move in on a broad front and assert regulatory power over all production facilities of all natural gas companies—to the utter disruption of regulation by the States over such production.

The Commission's ''dedication'' argument projects practical difficulties that the Commission has not faced up to.

Would the Commission say that the gas reserves were so firmly committed to the interstate traffic that the natural gas company could not sell gas from the reserves to intrastate customers without the approving nod of the Commission?

Would the Commission maintain that in the interest of interstate transportation it can compel the natural gas company to drill wells on these undeveloped reserves and to connect the wells to the interstate pipe line system?

Would it say that the gas reserves were so ''pledged'' or ''dedicated'' that the pipe line company could not dis-

continue rentals and abandon gas leases believed to be unprofitable, except on Commission approval?

The Commission, we take it, would make none of these contentions. Yet these consequences would follow if the "dedication" theory were countenanced.

Aside from these practical problems, the plain fact of the matter is that Sections 4, 5 and 7 of the Act, on which the Commission relies for this argument, relate only to the transportation or sale of natural gas and have nothing to do with the activity of producing gas. In these sections Congress took pains to describe the powers conferred on the Commission as powers over "transportation or sale of natural gas subject to the jurisdiction of the Commission" (Section 4 (a), (b) and (c), and Section 5 (a)), "transportation facilities" (Section 7 (a)), and "facilities subject to the jurisdiction of the Commission" (Section 7 (b)). These limitations the Commission asks the Court to disregard.

This Court, in *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U. S. 581, made mention of Sections 4, 5 and 7 of the Act as marking the distinction between transportation and sale on the one hand and producing and gathering on the other hand. It said at page 598:

> "Transportation and sale do not include production or gathering. Other sections emphasize that distinction. Thus §4 and §5, the rate regulating provisions of the Act, refer to charges for the 'transportation or sale of natural gas, subject to the jurisdiction of the Commission.' §7(a) relates to the extension or improvement of 'transportation facilities'; §7(b) to the abandonment of 'facilities subject to the jurisdiction of the Commission'; §7(c) to the construction or extension of facilities

for the 'transportation or sale of natural gas, subject to the jurisdiction of the Commission'."

(3) The "life blood" doctrine.

The Commission in its brief expresses concern over the possibility that, in absence of Commission control over transfers of gas leases, a natural-gas company might dispose of so many of its reserves that it would give up its "life blood", could no longer serve its pipe line, and would bring about an unregulated abandonment.

The "life blood" doctrine overlooks the practical side of the matter which Congress surely appreciated,—that an interstate pipeline represents a huge investment which no company would deliberately jeopardize by dissipating its gas reserves.

As Mr. Maguire, Chairman of the Board of Panhandle, explained in an affidavit submitted in this case (R. 49):

> "It is to be borne in mind that Panhandle has more than $100,000,000 investment in transmission facilities. In my opinion, the Board of Directors will continue to protect Panhandle's huge investment in such transmission facilities by maintaining an adequate gas reserve."

It is safe to assume that Congress, in denying the Federal Power Commission authority over gas reserves, realized that in state control and in management control there existed ample safeguards for conservation and preservation of those reserves.

The Commission is taking an inconsistent position in this connection; the fact is that the realities in the matter have not escaped the Commission's attention when dealing with an application for the construction of a pipe line system by another company approved recently.

In its opinion in that case, the Commission expressed its view that proof of sufficient gas reserves to assure operation of the pipe line facilities over a period of future years was not necessary where there was a probability that, in the exercise of good business judgment, the applicant would obtain additional gas supplies in the future (Opinion No. 177, issued March 30, 1949 in the *Matter of Texas Gas Transmission Corporation,* Docket No. G-859 and other consolidated dockets). The Commission said (p. 16):

> "It appears from such testimony that both the geology and the intensive exploratory activity in the region point to a reasonable likelihood of the discovery of additional gas reserves in substantial volume. To refuse to give weight to this probability would be justified only by a conclusion that Texas Eastern will not share with the other pipelines in contracting for gas from new discoveries in the region. This we cannot do for Texas Eastern has shown to our satisfaction that it is in a good position, both experience-wise and from an economic standpoint, to conclude needed purchases from developing reservoirs."

II.

The complaint did not show any basis for issuance of injunction.

The courts below were right in holding that the Commission made no case for injunctive relief.

A. No basis for relief was shown under Section 20(a) of the Natural Gas Act.

Under Section 20(a) of the Natural Gas Act the Commission may apply to a district court for an injunction against acts or practices

"which constitute or will constitute a violation of the provisions of this act, or of any rule, regulation, or order thereunder."[3]

The complaint alleges no violation or threatened violation of the Natural Gas Act or of any rule or regulation. Moreover, the Commission does not urge that its case is grounded upon any such violation.

The Commission argues that its claim for injunctive relief under Section 20(a) is based upon the part of its order of November 10, 1948, which directed that pending hearing and determination on the question whether the transfer by Panhandle to Hugoton of gas leases should be set aside, the *status quo* should be maintained and Panhandle should refrain from distributing the stock of Hugoton.

The Court of Appeals fully considered this argument, but held that the purported order of the Commission of November 10, 1948, directing maintenance of the *status quo* was "not a valid order because beyond commission jurisdiction", and that accordingly "the Commission cannot have court help to enforce it" (R. 80).

This holding was correct. The Commission points to Section 16 of the Act which gives it power to issue "such orders * * * as it may find necessary or appropriate to carry out the provisions of this act". Section 16 most certainly does not warrant the issuance of an order covering a subject matter with respect to which the Commission has no jurisdiction.

In addition, Section 16 does not authorize, nor does any other section of the act authorize, issuance by the Com-

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[3] Section 22 of the Act, also referred to in the complaint, is a jurisdictional and venue section which supplements Section 20, but in no way expands upon the instances in which the Commission may seek court aid in accordance with Section 20(a).

mission of an order which imposes a stay or restraint pending an investigation. It is settled that administrative agencies are not vested with judicial power under Article III of the Constitution and receive no implied powers from general principles of equity. vom Baur, *Federal Administrative Law*, Sec. 150 (1947 Cum. Supp.) The governing statute, not general equitable principles, is the guide to an administrative agency's jurisdiction and authority. *Commissioner of Internal Revenue* v. *Gooch Milling & Elevator Company*, 320 U. S. 418, 420 (1943).

The Commission argues in its brief that the order "no more involved the exercise of judicial power, let alone Article III judicial power, than a Commission order directing a natural-gas company to reduce its rates or prohibiting a company from abandoning service". This analogy is not well taken, because not only does the Commission have full power under Sections 5 and 7 to issue orders reducing rates and denying approval for abandonment of service, but such orders are only to be issued after a hearing on the matter and are definitive and reviewable orders.

The Commission has held no hearing as the basis for its purported restraining order of November 10, 1948, and its direction to maintain the *status quo* is interlocutory and not reviewable. *Federal Power Commission* v. *Metropolitan Edison Company*, 304 U. S. 375, 384 (1938).

In the only case which has come to our attention on this question, the Court of Appeals for the Fifth Circuit has held that under the Federal Power Act, an analogous statute, only a definitive and reviewable order may be enforced by the district court. *Mississippi Power & Light Company* v. *Slaff*, 131 F. 2d 148, 150 (1942).

Subjecting the Commission's purported restraining order of November 10, 1948 to any test, either substantive

or procedural, it was beyond the power of the Commission and unenforcible under Section 20(a) of the Natural Gas Act.

B. No basis for relief was shown by invoking the general equitable powers of the District Court.

The Commission realized the weakness of its position under Section 20(a) of the Natural Gas Act, because it amended its complaint on the hearing before the District Court so as to invoke the general equitable powers of the Court.

The Commission urges the theory that if it cannot meet the tests of Section 20(a), the Court should nevertheless intervene in the exercise of equitable jurisdiction.

The Commission leans on the cases holding that where an administrative body has been given jurisdiction by Congress over an activity, it may resort to the courts for assistance in protecting that jurisdiction.

We do not question the existence of that rule, nor did the courts below question it.

It has no application, however, in a case, where, as here, the organic statute by specific provision (Section 20) defines the situations in which the administrative agency has the right to go to the courts for injunctive relief. Furthermore, under the "assistance" doctrine probable jurisdiction in the administrative agency must be made to appear. In the present case probable jurisdiction in the Federal Power Commission was lacking, since the Commission was applying for assistance in a field that Congress had told the agency in unmistakable terms to keep out of.

Conclusion.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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